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In the Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF EL CENTRO, CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Border patrol agents "detained" aliens, for purposes of 42 U.S.C. 249, by ordering the van in which the aliens were riding to stop even though the van fled from the agents, instead of stopping.

2. Whether the circumstances of this case created an emergency situation that would alleviate the usual need to prove, in order to establish an implied-in-fact contract, that the government representative in question had the actual authority to bind the government.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Brower v. *County of Inyo*, 489 U.S. 593 (1989) 6, 9, 10
California v. *Hodari D.*, 111 S. Ct. 1547 (1991).. 9, 10
Carpenter v. *Sigler*, 419 F.2d 169 (8th Cir. 1969) 11
City of Revere v. *Massachusetts General Hospital*, 463 U.S. 239 (1983) 8
DeShaney v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) 8
Eastern Extension Telegraph Co. v. *United States*, 251 U.S. 355 (1920) 12
Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947) 12
Halvorson v. *United States*, 126 F. Supp. 898 (E.D. Wash. 1954) 11
INS v. *Delgado*, 466 U.S. 210 (1984) 9
Michigan v. *Chesternut*, 486 U.S. 567 (1988) ... 9
OPM v. *Richmond*, 110 S. Ct. 2465 (1990) 12, 13
Patterson v. *City of Joplin*, 878 F.2d 262 (8th Cir. 1989) 11
Roach v. *City of Frederickstown*, 882 F.2d 294 (8th Cir. 1989) 11
The Floyd Acceptances, 74 U.S. (7 Wall.) 666 (1869) 12
United States v. *Kerr*, 817 F.2d 1384 (9th Cir. 1987) 10

Cases—Continued: Page

United States v. *Mendenhall*, 446 U.S. 544 (1980) 9
United States v. *Morrison*, 546 F.2d 319 (9th Cir. 1976) 10
United States v. *Nicholas*, 448 F.2d 622 (8th Cir. 1971) 11
United States v. *Owens*, 472 F.2d 780 (8th Cir. 1973) 11
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 12
United States v. *Robert L.*, 874 F.2d 701 (9th Cir. 1989) 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) 12
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 8

Constitution, statutes, and regulations:

U.S. Const.:
Art. I, § 8 2
Amend. IV 7, 9, 10
8 U.S.C. 1103(a) 2
8 U.S.C. 1222 8
8 U.S.C. 1225(b) 8
8 U.S.C. 1252(c) 2, 4, 5, 8
8 U.S.C. 1282(b) 8
42 U.S.C. 249 ..... 4-5, 6, 7, 8, 9
42 U.S.C. 249(a) 2
42 U.S.C. 249(c) 2
42 U.S.C. 291c(e) 8
8 C.F.R. 100.2 2
28 C.F.R. 0.105 2

Miscellaneous: Page

Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333 (1933) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 922 F.2d 816. The opinions of the Claims Court are reported at 16 Cl. Ct. 500 (Pet. App. A45-A68) and 17 Cl. Ct. 794 (Pet. App. A25-A44). The unpublished findings of the Claims Court are not reprinted in the petition appendix, but can be found at C.A. App. 21-38.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1990. The petition for a writ of certiorari was filed on March 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal government has the authority and responsibility to protect the integrity of the borders of the United States. U.S. Const. Art. I, § 8. This responsibility is assigned to the Attorney General, who carries out this duty, in part, through the Border Patrol Division of the Immigration and Naturalization Service (INS). 8 U.S.C. 1103(a); 28 C.F.R. 0.105; 8 C.F.R. 100.2. The Attorney General is authorized to expend funds for the operation of facilities for the detention of aliens against whom a final order of deportation has already been made. 8 U.S.C. 1252(c). Also, "any person detained by [the INS] may be treated and cared for by the Public Health Service." 42 U.S.C. 249(a). If a person or entity other than the Public Health Service provides such treatment, Section 249(c) provides for payment by the Public Health Service "when authorized by the officer in charge of the station at which the application is made."

2. On January 23, 1985, Border Patrol agents observed several vans parked beside Interstate 8, west of El Centro, California, in an area known to be a rendezvous point for smugglers bringing aliens across the border illegally. At about the same time, the agents learned that Border Patrol sensors had detected a group crossing the border. Shortly thereafter, the agents saw one of the vans traveling eastward on the highway. They attempted to stop the van by following it and activating their red emergency lights, but the van fled at high speed. In an effort to evade his pursuers, the driver of the van swerved off the highway onto an exit ramp. He failed to negotiate a turn at the top of the exit ramp, however, and the van vaulted over the embankment and exploded. The agents radioed for assistance and attempted to extinguish the flames. The driver and two passengers were killed; 14 of the passengers were injured and were taken by ambulance to El Centro Community Hospital (ECCH).

Pet. App. A2-A3, A46-A47.[1] No one was taken into custody at the scene of the accident. C.A. App. 23-25, 30, 219-220, 227-228.

Border Patrol Agent Mario Hernandez, who was not at the scene of the accident, was ordered to proceed to ECCH to obtain information about the survivors for the Border Patrol's accident report. He arrived at the hospital in uniform shortly before the ambulances. Pet. App. A48. In a conversation with Kaye Fox, the hospital's Assistant Director of Finance, Agent Hernandez identified himself as a Border Patrol agent and explained the circumstances surrounding the accident. *Id.* at A49. When asked who would pay the cost of the aliens' medical care, he testified that he replied, "Me and you." *Id.* at A49; C.A. App. 140. Ms. Fox further testified that Agent Hernandez said that the INS would pay because the aliens were in custody. Pet. App. A49; C.A. App. 75. Agent Hernandez reported this conversation to his supervisor, but he denied stating that the aliens were in custody or that the INS would pay for their care. C.A. App. 141-142; see also *id.* at 144-145.[2] He also took custody of one alien's passport, which a nurse had found on the emergency room floor. Pet. App. A50.[3] Finally, Agent Hernandez told a nurse that the Border Patrol should be notified before each alien was discharged, so that an INS agent could take the alien into custody. *Id.* at A3, A50.

Two INS investigators visited the hospital, photographed each alien, and signed the hospital's release forms for the

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[1] Two others were taken to another hospital. Payment for their care and treatment is not the subject of this litigation.

[2] The Claims Court declined to resolve this conflict in the witnesses' testimony. Pet. App. A49 n.4.

[3] The passport belonged to an alien who had been air-lifted to a hospital in San Diego. Pet. App. A50 n.5.

photographs on the line marked "Patient/Parent/Conservator/Guardian." Pet. App. A3, A50-A51. In addition, an INS doctor visited the hospital to review the aliens' medical records and stated that he was "responsible for medical follow-up to make sure [ECCH] doctors were taking care" of the aliens. *Id.* at A3, A51. No guard was placed at the hospital. C.A. App. 24, 31. Each time the hospital prepared to discharge one of the aliens, the hospital notified the Border Patrol, and an agent took the alien to the Border Patrol station. Pet. App. A51. When one alien left without being discharged, he was listed by the Border Patrol as having "escaped," *id.* at A51-A52, although the agents did not complete any of the reports required when an alien escapes from Border Patrol custody. C.A. App. 31, 186-188.

Ms. Fox, the ECCH assistant finance director, contacted Donald Davis, the INS Agent-In-Charge of the El Centro Station, in order to clarify how the hospital would be reimbursed for the medical care afforded to the aliens. Davis referred her to James O'Keefe, a management official in INS's regional office. When Fox contacted Mr. O'Keefe, he did not expressly deny liability and said that he would "check into" the matter. Pet. App. A67 n.13.

The hospital submitted invoices to INS in the amount of $183,263.64. The Regional Director of the INS responded to each invoice with a letter denying liability on three grounds: (a) the aliens had not been injured as a result of INS negligence; (b) the aliens were not in custody when they were hospitalized; and (c) the agents acted only as "good Samaritans" in calling for the ambulances following the accident. Pet. App. A52, A68.

3. Petitioner, the City of El Centro, brought this action in the United States Claims Court, asserting that it was entitled to reimbursement for the cost of treating the aliens by virtue of two statutes, 8 U.S.C. 1252(c) and 42 U.S.C.

249, or under an implied-in-fact contract theory. After a trial, the Claims Court found that the aliens were not in custody during the pursuit or at the scene of the accident, but were in de facto custody at the time of their hospitalization. Pet. App. A46; C.A. App. 21-38. The court dismissed petitioner's statutory claims, Pet. App. A53-A55, but found an implied-in-fact contract for reimbursement between the parties. *Id.* at A63. In so ruling, the court relied on statements by Agent Hernandez to ECCH's representatives on the night of the accident, on the conduct of other Border Patrol and INS officials during the ensuing weeks, and on the failure of the INS expressly to deny liability for the cost of the aliens' hospital care until almost all of the aliens had been discharged. *Id.* at A59-A63. Although petitioner had not established that Agent Hernandez or any INS official with whom petitioner dealt had the requisite authority to bind the United States in contract, the court imputed the requisite authority to Agent Hernandez because he may have been able to exercise such authority during an emergency. *Id.* at A65-A66. Alternatively, the court held that the INS had ratified the actions of Agent Hernandez because the "INS had knowledge of all the conduct pertinent to this court's finding of an implied-in-fact contract" and the "INS took no action to assert its non-liability for the aliens' care until its letter dated March 7, 1985." *Id.* at A66; see *id.* at A32-A34. The court also held that the INS ratified the actions of its agents by accepting the benefits flowing from their conduct. *Id.* at A34.

4. The court of appeals reversed by a divided vote. Pet. App. A1-A24. The court agreed with the Claims Court that neither 8 U.S.C. 1252(c) nor 42 U.S.C. 249 required the government to pay petitioner compensation for the hospital's care and treatment of the aliens, and that, in any event, petitioner had not complied with the statutory requirements for obtaining payment under 42 U.S.C. 249. Pet.

App. A5-A7.[4] The court, however, disagreed with the Claims Court's ruling that there was an implied-in-fact reimbursement contract between the parties.

The court stated that an implied-in-fact contract with the government requires proof of: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) sufficient conduct by a government representative having actual authority to bind the government in contract. Pet. App. A7-A8. The court concluded that, in this case, there was no implied-in-fact contract because petitioner did not establish elements 2 and 4. *Id.* at A10-A17. With respect to the fourth element, the court found that Agent Hernandez did not have the requisite contracting authority and that no official with such authority promised to pay for the aliens' treatment. *Id.* at A9, A12. With respect to the second element—consideration—petitioner had argued that, because the aliens were detained by the government and because the government is responsible for the care and treatment of such detainees under 42 U.S.C. 249, petitioner's treatment conferred a benefit upon the government. The court of appeals determined that the Claims Court erred in finding that the aliens were detained either before or during their hospitalization of the aliens. *Id.* at A15. Relying on *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), the court found that the INS's pursuit of the fleeing vehicle which ended in the crash did not constitute a detention. Pet. App. A15. Nor did the INS detain the aliens after the crash, the court added, because the INS agents did not take physical custody of the aliens. In fact, the court noted, the hospital and the INS understood that the hospital would contact the INS before an alien was released so that the INS could then take each alien into

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[4] The dissent did not disagree with the majority on those points. See Pet. App. A18-A24 (Rich, J., dissenting).

custody. *Ibid.* Because the aliens were not detained by the INS, INS had no responsibility to provide care for the aliens. *Ibid.*

ARGUMENT

1. Petitioner first contends that the court of appeals erred by finding that the consideration element for an implied-in-fact contract was lacking. Pet. 10-23. Petitioner's argument that the government received consideration proceeds in two steps. First, petitioner states that the government stipulated at trial that the INS is statutorily responsible for the treatment of aliens "taken into custody or detained" by the Border Patrol. Pet. 12. Second, petitioner argues that the Border Patrol agents' pursuit of the aliens' vehicle was a "detention" of the aliens from the outset, and that the aliens were thus in INS's "custody" throughout their stay in the city's hospital. Pet. 12-13. That argument lacks merit.

a. Petitioner's argument hinges on its reading of the phrase in the government's stipulation stating that the INS is responsible for the treatment of aliens "taken into custody or detained" by the INS. See Pet. 10. Petitioner assumes that the term "detained" in that stipulation has the same meaning as the term "detention" or "seizure" under the Fourth Amendment, but that assumption is mistaken.[5]

As the court of appeals noted, the government's obligation to treat aliens is set out in 42 U.S.C. 249, which also

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[5] "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs through all legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933).

uses the term "detained."[6] That term is commonly used in the immigration laws to refer to taking an alien into the physical custody of the INS. See, *e.g.*, 8 U.S.C. 1222 (authorizing the detention of aliens for purposes of conducting medical examinations), 1225(b) (authorizing the detention of aliens who are not clearly entitled to land), 1252(c) (authorizing the Attorney General to select the site of detention pending deportation), 1282(b) (authorizing the detention of alien crewman who do not intend to leave with their ship). That interpretation of the term "detained" is a sensible one in this context as well, since the federal government has the obligation to provide aliens in the actual, physical custody of the INS with necessary medical care. See *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). Cf. *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198-200 (1989); *Youngberg* v. *Romeo*, 457 U.S. 307, 314-316 (1982). In this case, the federal government did not have physical custody of the aliens, however, until they were discharged from the ECCH. Only at that point were they detained by the INS and, therefore, only at that point did the federal government assume responsibility to ensure that the aliens received medical care. The court of appeals therefore correctly ruled that the federal government was not obligated by federal law to pay the ECCH for the medical care that the aliens received at the hospital.[7]

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[6] As the court of appeals noted, Section 249 is permissive and does not mandate treatment even for those who are "detained."

[7] Any constitutional right that the aliens may have had to receive necessary medical care is personal to them, and the federal government does not have a constitutional obligation to reimburse a hospital for the care of persons in the physical custody of the INS. In fact, hospitals such as ECCH that receive public funding have an independent duty to provide medical care to indigents who require emergency treatment. See 42 U.S.C. 291c(e).

b. In any event, petitioner's argument would lack merit even if the term "detained" as used in the trial stipulation and 42 U.S.C. 249 had the same meaning as the term "seizure" in the Fourth Amendment. Petitioner maintains that a "seizure" occurs whenever a law enforcement officer, through a show of authority, signals a person to stop. Pet. 19-23. Recently, however, this Court has twice clearly rejected that argument. In *Brower* v. *County of Inyo*, *supra*, the Court explained that police officers did not seize a fleeing suspect until his fatal crash into a police-erected barricade, even though the preceding 20-mile chase was surely an adequate "show of authority." 489 U.S. at 599. In *California* v. *Hodari D.*, 111 S. Ct. 1547, 1552 (1991), the Court assumed that an officer's close-range pursuit of a fleeing suspect was a "show of authority," but held that the suspect was not "seized" until he was tackled by an oncoming officer. Both cases made clear that a Fourth Amendment "seizure" occurs only when a law enforcement officer (or another governmental agent) intentionally acquires physical control over a person or object. *California* v. *Hodari D.*, 111 S. Ct. at 1549-1552; *Brower* v. *County of Inyo*, 489 U.S. at 596-597.[8]

In this case, the Border Patrol, through a show of authority, signalled to the driver of the aliens' van to halt, but the

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[8] *Hodari D.* also makes clear that petitioner errs in relying, see Pet. 19, on the so-called *Mendenhall* test that was originally formulated by Justice Stewart in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), and was adopted by the Court in later cases, *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984). That test provides that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554. *Hodari D.* made clear that the *Mendenhall* test is a necessary but not a sufficient condition for a seizure. 111 S. Ct. at 1551.

driver did not stop. The Border Patrol command was not a "seizure," since the van did not yield to it. As the Court explained in *California* v. *Hodari D.*, if a person flees after being told to halt by a law enforcement officer, "[t]hat is no seizure." 111 S. Ct. at 1550. The driver continued until the accident occurred. Although the aliens then came to rest temporarily, there was still no "seizure," because the Border Patrol agents did not intend to cause the aliens' van to crash. See *Brower* v. *County of Inyo*, 489 U.S. at 597. After the crash, the injured aliens were taken to the ECCH, where they remained until their release into the custody of the INS. The Claims Court found that the INS did not acquire physical custody over the aliens until that point, see C.A. App. 21-38; the court of appeals did not disturb that finding, see Pet. App. A13; and petitioner does not challenge it in this Court. Under these circumstances, the INS did not incur an obligation to provide for the medical care of the aliens until the agency had actual, physical control over them.

c. Petitioner also maintains that review by this Court is necessary to resolve a conflict among the circuits on the question whether a "seizure" for purposes of the Fourth Amendment requires a law enforcement officer to have physical control over a suspect. Pet. 13-19. This Court recently resolved that precise question in *California* v. *Hodari D.*, however, by holding that a "seizure" requires physical control over a suspect. 111 S. Ct. at 1549-1552.[9]

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[9] There is also less to the alleged conflict than meets the eye. Prior to *Brower* v. *County of Inyo*, the Ninth Circuit had ruled that a police officer's use of a patrol car's flashing lights or siren constitutes a stop. *United States* v. *Morrison*, 546 F.2d 319, 320 (1976); see also *United States* v. *Kerr*, 817 F.2d 1384 (1987); *United States* v. *Robert L.*, 874 F.2d 701 (1989) (both following *Morrison*). But that court did not reconsider this issue in light of this Court's decision in *Brower* v. *County of Inyo*. The Ninth Circuit's decisions in *Morrison* and *Kerr* predated *Brower*; that court's decision in *Robert L.* postdated *Brower*, but the

2. Petitioner contends that the court below erred by ruling that, to establish an implied-in-fact contract, a party must prove that the contracting government official had the authority to bind the government. Petitioner agrees that a person who enters into an agreement with the government generally bears the risk that the contracting officer has exceeded his authority. Petitioner argues, however, that there should be an exception to that rule in the case of emergencies. Pet. 23-30. That claim does not warrant further review.

To begin with, petitioner must prevail on both questions in order for the judgment below to be set aside. Accordingly, unless petitioner can prove that the federal government received adequate consideration, petitioner cannot establish an implied-in-fact contract regardless of how the second question is answered. Because petitioner cannot show that the government received consideration, this Court would not need to reach the second question presented if certiorari were granted.

In any event, the court of appeals did not reject petitioner's claim as a matter of law. Instead, the court simply found that, on the facts of this case, there was no emergency requiring the federal government to appropriate private property in order to protect the public interest. Pet. App. A10. To the contrary, the court noted, "[t]he hospital was preparing to attend to the injured aliens." *Ibid.*[10]

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court there did not cite or discuss *Brower*. Like the Ninth Circuit, the Eighth Circuit prior to *Brower* had ruled that a police officer's use of a patrol car's flashing lights or siren constitutes a stop. *Carpenter* v. *Sigler*, 419 F.2d 169, 171 (1969); see also *United States* v. *Nicholas*, 448 F.2d 622 (1971); *United States* v. *Owens*, 472 F.2d 780 (1973) (both following *Carpenter*). After *Brower*, however, the Eighth Circuit changed its view and held that police pursuit alone, even if the car's lights are flashing or the siren is blaring, does not constitute a seizure. *Patterson* v. *City of Joplin*, 878 F.2d 262 (1989); *Roach* v. *City of Frederickstown*, 882 F.2d 294 (1989).

[10] For that reason, the decision below does not conflict with *Halvorson* v. *United States*, 126 F. Supp. 898 (E.D. Wash. 1954), on

The court of appeals' decision that there was no implied-in-fact contract also rests on settled principles that do not require clarification. It is clear that the creation of an implied-in-fact contract requires actions by a government officer with the authority to bind the government in contract. *Eastern Extension Telegraph Co.* v. *United States*, 251 U.S. 355, 363, 366 (1920). That conclusion is an application of the general principle that the government "is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). As this Court has made clear: "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) (government insurance contract that is contrary to regulations is not enforceable). Accord *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1869) (bills of exchange issued by the Secretary of War who lacked necessary statutory authority were not enforceable).

This Court recently reiterated those principles in *OPM* v. *Richmond*, 110 S. Ct. 2465 (1990). In *Richmond*, the plaintiff detrimentally relied upon erroneous advice from a federal employee. The Court denied the plaintiff's claim for compensation on the ground that the conditions defined by Congress for charging the public treasury must be strictly observed, and the claim was contrary to the rele-

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which petitioner relies, Pet. 28 n.8, in which the court found that an emergency existed. The remaining decisions cited by petitioner are earlier Court of Claims decisions. Petitioner's allegation of an intracircuit conflict, however, is for the Federal Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

vant law. 110 S. Ct. at 2469. The rationale of the *Richmond* case is instructive in this context. Application of the principle that a government official must have the authority to bind the government assures that public funds will be spent only according to the judgments reached by Congress, and not according to the mistakes of government agents. Compare *id.* at 2473.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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